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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Thare Gonzalez-Medina,

10 Petitioner,

11 v.

12 USA,

13 Respondent.  
14

No. CV-15-2434-PHX-DGC (DKD)

**REPORT AND RECOMMENDATION**

15 TO THE HONORABLE DAVID G. CAMPBELL, U.S. DISTRICT JUDGE:

16 Thare Gonzalez-Medina filed an amended motion under 28 U.S.C. § 2255 arguing  
17 that his sentence was improperly increased under *Johnson v. U.S.*, 135 S.Ct. 2551 (2015).  
18 Respondents raise several arguments against granting him relief. As explained below, the  
19 Court recommends that Gonzalez-Medina's petition be denied and dismissed with  
20 prejudice.

21 **Background**

22 In 2005, Gonzalez-Medina was convicted of one felony count of possession with  
23 intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1) & (b)(B)(vii) ("2005  
24 Conviction"). (2:04-CR-00597-SMM at Doc. 28) He was sentenced to 40 months in  
25 prison to be followed by a term of supervised release ("2005 Sentence"). (*Id.*)

26 In 2009, Gonzalez-Medina entered a plea of guilty to one count of illegal re-entry  
27 of a removed alien in violation of 8 U.S.C. § 1326(a) ("2009 Conviction"). (2:09-CR-  
28 00881-DGC at Docs. 19, 20) His sentence was enhanced under 8 U.S.C. § 1326(b)(1)

1 (“2009 Sentence”). (*Id.*) He was released from custody on December 5, 2011, and he  
 2 was removed from the United States shortly thereafter. (Doc. 15, Exs. 3, 4)

3 In 2013, Gonzalez-Medina was found in the United States and again entered a plea  
 4 of guilty to one count of illegal re-entry in violation of 8 U.S.C. § 1326(a) (“2013  
 5 Conviction”). (4:13-CR-01511-TUC-JGZ at Doc. 20) His sentence was enhanced under  
 6 8 U.S.C. § 1326(b)(2) (“2013 Sentence”). (*Id.*)

7 In 2015, Gonzalez-Medina moved for relief under 28 U.S.C. § 2255. (Doc. 6) It  
 8 appears that he is arguing that he should be resentenced under *Johnson v. U.S.*, 135 S.Ct.  
 9 2551 (2015).

### 10 Analysis

11 The Government raises several arguments against the Court’s review of Gonzalez-  
 12 Medina’s motion.<sup>1</sup> (Doc. 15) Assuming that the Court can review his claim for relief,  
 13 Gonzalez-Medina is not entitled to any.

14 In *Johnson*, the U.S. Supreme Court found that the residual clause of the Armed  
 15 Career Criminal Act was unconstitutionally vague, 135 S.Ct. 2551. However, Gonzalez-  
 16 Medina’s 2013 Conviction and Sentence were based on 8 U.S.C. §§ 1326(a) and (b)(2).  
 17 Neither of these statutes contains a residual clause and so *Johnson* is inapposite.  
 18 Gonzalez-Medina’s 2013 Sentence was enhanced because of his 2009 Conviction which,  
 19 in turn, was enhanced because of his 2005 Conviction. Neither the 2005 Conviction nor  
 20 the 2009 Conviction involved a sentencing enhancement that was based on a residual  
 21 clause and so Gonzalez-Medina cannot argue that he is entitled to relief under *Johnson*.

22 **IT IS THEREFORE RECOMMENDED** that Thare Gonzalez-Medina’s  
 23 Amended Motion to Vacate, Set Aside or Correct Sentence be **denied and dismissed**  
 24 **with prejudice** (Doc. 6).

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 26 <sup>1</sup> One of Respondent’s arguments is that Gonzalez-Medina’s claims are moot  
 27 because he is no longer in custody for the 2009 Conviction. (Doc. 15 at 7-8) The Court  
 28 agrees that he is not entitled to relief but notes that petitioners may challenge the  
 collateral consequences of a conviction even after their release from custody. *See, e.g.,*  
*Spencer v. Kemna*, 523 U.S. 1 (1998) (release from prison does not render habeas petition  
 moot because petitioner may still suffer from collateral consequences).

1           **IT IS FURTHER RECOMMENDED** that a Certificate of Appealability and  
2 leave to proceed *in forma pauperis* on appeal be **denied** because dismissal of the Petition  
3 is justified by a plain procedural bar and jurists of reason would not find the ruling  
4 debatable.

5           This recommendation is not an order that is immediately appealable to the Ninth  
6 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules  
7 of Appellate Procedure, should not be filed until entry of the district court's judgment.  
8 The parties shall have fourteen days from the date of service of a copy of this  
9 recommendation within which to file specific written objections with the Court. *See*, 28  
10 U.S.C. § 636(b)(1); Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter,  
11 the parties have fourteen days within which to file a response to the objections. Failure  
12 timely to file objections to the Magistrate Judge's Report and Recommendation may  
13 result in the acceptance of the Report and Recommendation by the district court without  
14 further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9<sup>th</sup> Cir. 2003).  
15 Failure timely to file objections to any factual determinations of the Magistrate Judge will  
16 be considered a waiver of a party's right to appellate review of the findings of fact in an  
17 order or judgment entered pursuant to the Magistrate Judge's recommendation. *See* Rule  
18 72, Federal Rules of Civil Procedure.

19           Dated this 22nd day of September, 2016.

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23 David K. Duncan  
24 United States Magistrate Judge  
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